# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Weightman v Gold Coast City Council & Anor* [2002] QCA 234 |
| PARTIES: | **ANNE WEIGHTMAN**<br>(appellant/applicant)<br>**v**<br>**GOLD COAST CITY COUNCIL**<br>(first respondent/first respondent)<br>**GORDON LAKELANDS PTY LTD** ACN 088 335 737<br>(second respondent/second respondent) |
| FILE NO/S: | Appeal No 2452 of 2002<br>P& E Appeal No 4246 of 2001 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Planning and Environment Appeal |
| ORIGINATING COURT: | Planning and Environment Court at Brisbane |
| DELIVERED ON: | 28 June 2002 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 26 April 2002 |
| JUDGES: | de Jersey CJ, McMurdo P, Atkinson J<br>Separate reasons for judgment of each member of the court; McMurdo P and Atkinson J concurring as to the orders made, de Jersey CJ dissenting |
| ORDER: | **1. Application for leave to appeal granted**<br>**2. Appeal allowed**<br>**3. Remitted to the learned primary judge to be determined in accordance with law** |
| CATCHWORDS: | ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – STRATEGIC PLANS – DEVELOPMENT CONTROL PLANS – where planning scheme prohibited buildings over three storeys – where Council approved construction of building to four storeys – where learned primary judge determined the conflict with the planning scheme was minimal – whether the planning scheme was properly construed – whether an error in construing the planning scheme constituted an error of law – whether the discretion under s 4.4(5A) *Local Government (Planning and Environment) Act* 1990 (Qld) was properly exercised |

*Local Government (Planning and Environment) Act* 1990 (Qld), s 4.3(1), s 4.4(5A)
*Integrated Planning Act* 1997 (Qld), s 4.1.56, s 6.1.2, s 6.1.3, s 6.1.29, s 6.1.30 (3)(a)

*Grosser v Council of the City of the Gold Coast* [2001] QCA 423, Appeal No 8502 of 2000, 9 October 2001, considered
*HA Bachrach Pty Ltd v Caboolture Shire Council* [1993] QPLR 33, followed
*House v The King* (1936) 55 CLR 499, considered
*Vynotas Pty Ltd v Brisbane City Council* [2001] 1 Qd R 108, considered
*Yu Feng Pty Ltd v Maroochy Shire Council* [2000] 1 Qd R 306, followed

COUNSEL: A N Skoien for the applicant
B G Cronin for the first respondent
M D Hinson SC, with S M Ure, for the second respondent

SOLICITORS: Creagh Weightman for the applicant
McDonald Balanda & Associates for the first respondent
Hickey Lawyers for the second respondent

[1] **de JERSEY CJ** I have had the advantage of reading the reasons for judgment of Atkinson J.

[2] The learned primary Judge's approach was, first, to accept that the application for development approval conflicted with the City of Gold Coast Planning Scheme and the Burleigh Ridge Development Control Plan because where it envisaged a four storey construction, it would exceed the prescribed maximum height; and second, to find that there were, nevertheless, "sufficient planning grounds to justify approving the application despite the conflict", a conflict which would otherwise have required the local authority to refuse the application. The Judge thereby followed the approach militated by s 4.4(5A) of the *Local Government (Planning and Environment) Act* 1990, which provides:

> "The local government must refuse to approve the application if-
> (a) the application conflicts with any relevant strategic plan or development control plan; and
> (b) there are not sufficient planning grounds to justify approving the application despite the conflict."

[3] As has been seen, under that provision, the local authority "must refuse" the application if it conflicts with a strategic plan or development control plan, unless there are sufficient planning grounds nevertheless to justify approving it. I agree with Atkinson J that the word "must" is, in s 4.4(5A), used in the imperative sense (cf. *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 390). I also agree that for the reasons Her Honour expresses, the extent of the conflict in this case could not reasonably be characterized as minor, or treated as merely "technical", even allowing for the circumstance that the planning instruments, amounting to a 'transitional planning scheme' (s 6.1.3 *Integrated Planning Act* 1997), are not binding: they still carry considerable weight (*Vynotas Pty Ltd v Brisbane City Counci* [2001] 1 Qd R 108, 113; *Grosser v Council of the*

*City of the Gold Coast* [2001] QCA 423). The question arises, however, whether the learned Judge's somewhat different approach to those two issues – the obligation to refuse (s 4.4(5A)(a)), and the proportion of the conflict – renders his decision to dismiss the appeal against the local authority's approval of the application, vulnerable as a matter of law.

[4] I extract below those portions of His Honour's reasons which gave rise to the contention that it does.

> "In this Zone and, in particular, at this site buildings are limited to three storeys ("H3 (H3)") in height: Part 4-20, Provisions 4.16.4.1 and 4.16.4.2. It is this height limit which, the appellant says, means the application "conflicts" with the Strategic Plan under *LGPEA* s. 4.4(5A).
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> [9] The appellant also contends the development is in conflict with the Burleigh Ridge Development Control Plan (Planning Scheme, Part 28-3), Provision 28.2.3(b)(ii):
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> "(ii) The height of all development shall be in accordance with the provision of the Planning Scheme and the residential density and building map heights. Council will have regard to this DCP and the Strategic Plan when assessing applications to increase the height of development pursuant to those provisions. The height of all development shall not exceed the maximum height stipulated in the Planning Scheme in any circumstances".
>
> [10] The respondent Council argued no conflict existed. Mr Ure of counsel for the co-respondent was, however, prepared to concede one arose but argued that there were sufficient planning grounds to justify approval of the application, despite that conflict: s.4.4(5A)(b).
>
> [11] The effect, and proper application of s. 4.4(5A), in the context of its importation under the *IPA* (s. 6.1.30 (3)(a)) is not a straight forward matter. First, as Thomas J. noted in *Lewiac Pty Ltd v Gold Coast City* (1994) 83 LGERA 224 at 230 the predominant approach to Strategic Plans is that they simply express objectives, and not every objective in them has to be met before an applicant's proposal can be accepted. Their general thrust is to specify aims, objectives and strategy. Thomas J. went on to say:
>
> > "There is however nothing that prevents a degree of particularity in a statement of something that is after all only an objective. As a forward planning strategy it contains relevant matters for consideration by the court".
>
> (And see *Fitzgibbons Pty Ltd v Logan City Council*(1997) QPELR 208 per Skoien SJDC, at 212).
>
> [12] Secondly, there is authority that, post-*IPA*, the Planning Scheme no longer has binding force. Davies JA. said in *Vynotas Pty Ltd v Brisbane City Council* (2001) 1 Qd R 108 at 113:
>
> > "In any event, the scheme of the *Integrated Planning Act* appears to be that, so far as it applies to development and use of premises, a transitional planning scheme no longer has binding force but is of persuasive relevance only. Thus s. 2.1.23 provides that a local planning instrument which includes a planning scheme may not prohibit

> development on, or the use of premises; and more specifically s. 6.1.2(3) provides that a prohibited use in a former planning scheme is taken to be no more than an expression of policy that the use is inconsistent with the intent of the zone in which the use is prohibited. These provisions relate only to prohibitions, *but if prohibitions in former planning schemes are now no more than policy statements it is unlikely that the Legislature intended any other provisions in such schemes to continue to have binding effect upon development applications under the Act*". (my italics)

Pincus JA. put the matter a little differently, at 114:

> "Apart from that it does not appear to me that the Legislature intended, by the language used in Ch. 6 of the 1997 Act, to make the provisions of transitional planning schemes absolutely binding, in the decision of development applications. On the other hand it is important to note that the 1997 Act did not by Ch. 6 create a planless situation. Citizens expect reasonable stability in the law's treatment of permitted land use. It would be unfortunate if Ch. 6 were used to defeat the reasonable expectations of those who have relied on, and perhaps expended substantial sums on the faith of, existing planning arrangements. The degree of flexibility which Ch. 6 contemplates does not justify failure to give considerable weight to planning arrangements, as they existed when Ch. 6 commenced, so far as such arrangements are required to be applied by s. 6.1.29(3)".

More recently, however, in *Grosser v Council of the City of Gold Coast* 2001 QCA 423 White J., (with whom Thomas and Williams JJA. agreed) remarked there can be little doubt that *IPA* s. 6.1.2. "*maintains the importance of consistency with the intent of a transitional planning scheme"* – and, at para. 38, went on to emphasize that the proper approach of this court, when hearing appeals, is one of restraint.

[13] Thirdly the Planning Scheme speaks of "*diversity*" and "*variety*" in townscape and urban character, and the Council's desire to achieve "*... gradation in building heights to complement groupings of high or low rise development*" (Part 1-11). Broad statements of this kind might be thought to reduce the force of provisions which purport to impose strict height limitations (e.g., Part 4-20). The Scheme itself reflects a significant level of diversity: on the other side of Park Street, directly opposite this development, commercial buildings of up to four storeys are permitted. In nearby "precincts", some no more than 200 metres from the site, buildings of 7, and even 15 storeys may be allowed (a matter the Council would be obliged to take into account: Planning Scheme, Provision 4.16.4.2(i)).

[14] The word "must" is, in some contexts, one of absolute obligation: see, for example, rules requiring personal service, as in *Posner v Collector for Interstate Destitute Persons (Vict)* (1947) 74 CLR 461 at 490 per Williams J.; but in others, it may be only directory: Blank's Law Dictionary, 6th Ed. (1990). In s. 4.5(5A) the

> conjunctive proviso in ss. (5A)(b) suggests it is to be construed in that manner, and not as an imperative.
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> [15] In any event, (b) makes it clear the discretion remains if an applicant can establish sufficient planning grounds to justify approval "despite the conflict". As Mr Ure submitted, the remarks of Davies JA. and Pincus JA. in *Vynotas (supra)*, with their reference to "policy statements" and a "degree of flexibility" under *IPA* Chapter 6 show the degree of "sufficiency" is likely to vary with the extent to which the proposed application "conflicts" with the Planning Scheme; and when, as here, the development is consonant with the Preferred Dominant Land Use Intent, the hurdle will not be terribly high.
>
> [16] Ultimately, I think it is correct to say a conflict does exist but, for the reasons set out above, does so in a context which means the onus upon the co-respondent to establish sufficient planning grounds to justify approval is not of the highest order."

[5] The terms in which the learned Judge expressed his views on the two issues to which I earlier referred are somewhat tentative. I isolate in particular his words "broad statements of this kind might be thought to reduce the force of provisions which purport to impose strict height limitations", and his reference to a factor which "suggests" the word "must" in s 4.4(5A)(a) should not be read as an imperative. On my reading of his reasons, his views on those two issues were not presented as conclusive, and because of the way he dealt with the appeal to him, it was not necessary for him to express concluded views. Accepting there was conflict, he chose to focus on the critical question raised by s 4.4(5A)(b), namely, whether there were sufficient planning grounds to justify approving the application despite any conflict. Focusing on para (b) in that way, it became of no moment whether His Honour regarded the obligation – but for (b) – to refuse the application, as mandatory. His Honour's "suggestion" that "must" might be read otherwise, did not, in other words, affect his subsequent decision. See para [15] of his reasons, beginning with the words "in any event".

[6] It may be felt that the learned Judge somewhat downplayed the significance of the conflict as to height restriction, contributing to his view that the onus borne in relation to para (b) was "not of the highest order". But that likewise lacks ultimate significance. The relevant consideration in law is that the developer bore the onus of establishing "sufficient planning grounds to justify approving the application despite the conflict", an onus to be discharged by reference to the ordinary civil standard of proof (cf. *Esteedog Pty Ltd v Council of the Shire of Maroochy* [1991] QPLR 7). I regard the Judge's reference to an onus "not of the highest order" as not dissonant with that ordinarily applicable standard.

[7] In concluding the co-respondent developer had discharged that onus, His Honour relied substantially on town planning evidence led by the co-respondent and the respondent council, as emerges from this passage in his reasons:

> "…the co-respondent's architect Mr Forgan-Smith, town planner Mr Buckley, and the respondent Council's town planner Mr Parker advanced a number of matters said to justify the height increase, and associated relaxations in carparking, and density requirements. Their evidence was persuasive that the following matters were consonant with the objectives of the Scheme, and constituted relevant planning grounds:
>
> (a) the proposal amalgamated six allotments in a manner which enabled an integrated development; the less attractive alternative

might well be six individual multi unit residential developments constituting a much less coherent contribution to the streetscape;

(b) it incorporated the continuation of a Roman Catholic place of worship in its former location, in Burleigh Heads, to meet the needs of permanent residents, and tourists;

(c) the mixed use nature of the proposal is one which is contemplated by the PDLU provisions of the Strategic Plan;

(d) the Connor Street part of the building has a direct relationship to the commercial, and mixed use area of Burleigh Heads, but has no significant impact on adjoining properties; and, the four storey component has no adverse impact in terms of privacy overlooking other premises or on any other amenity of neighbouring properties;

(e) it will act as an appropriate transition between the commercial development in the CBD, and the more residential development to the south;

(f) it has a positive impact on the residential amenity of the area by bringing the residential development north along Connor Street, to interface with the CBD;

(g) save for the technical non-compliance with the H3 requirement, the proposal complies in all respects with the mixed resident and tourist accommodation objectives;

(h) it provides for the needs of tourists while maintaining existing residential amenity, and achieves diversity in townscape, and urban character;

(i) it will preserve an enhanced view of Burleigh Ridge from Park Street.

[8] I agree with Atkinson J that when proceeding under s 4.4(5A)(b), the decision maker should desirably, in Her Honour's terms:

> "(1) examine the nature of the conflict;
>
> (2) determine whether there are any planning grounds which are relevant to the part of the application which is in conflict with the planning scheme and if the conflict can be justified on those planning grounds;
>
> (3) determine whether the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application notwithstanding the conflict."

[9] While His Honour may, by aggregating the factors in paras (a) to (i) above, have conflated the second and third stages of such a process, the staging of the consideration in that way, while an appropriately careful and convenient way of going about the analysis, is not dictated by s 4.4(5A)(b). In the result, I find it difficult to conclude – as was suggested in argument – that because the nine aspects covered in the lettered paragraphs included general town planning considerations as well as some bearing specifically on the point of conflict, His Honour erred in law.

[10] A remaining question is whether, by any downplaying of the significance of the height restriction, His Honour's approach to para (b) should be regarded as tainted in law. I am not persuaded that it was. His Honour concluded that notwithstanding the conflict, there were sufficient planning grounds to justify approval. The character of that conclusion was factual. There is no indication that any downplaying of the significance of the height restriction materially tainted his assessment to the point where one may conclude he erred in law.

[11] The circumstances which His Honour listed as warranting approval notwithstanding the conflict would justify approval whether or not the conflict were regarded as serious. The Judge has accepted that the conflict existed, and that it arose from a proposed height which exceeded what amounted, under the planning documents, to a prohibition. Section 4.4(5A)(b) assumes that even where such a prohibition would be breached, a combination of relevant planning considerations might nevertheless justify an approval. The provision does not regulate the power to approve by reference to the gravity of the conflict: the power to approve is dependent only upon there being sufficient town planning justification. His Honour found a sufficient combination of considerations to justify approval, and all of them were potentially relevant. While others may feel that he somewhat understated the significance of the height prohibition, that does not mean that, in the end, his factual assessment involved error of law, in circumstances where the aggregation of circumstances on which he relied under para (b) could, as a matter of law, activate that provision.

[12] It is important to recognize that the height prohibition was ultimately not definitive. The significance to be attributed to it bore upon the weighing of competing considerations. That process being evaluative, it is the more difficult in principle to say that by some understating of the significance of one factor, being the prohibition, the Judge erred in law. As to that significance, reasonable minds may differ. The important point is that His Honour must be taken to have acknowledged the prohibition for what it was – a prohibition, while quite properly noting views expressed in the Court of Appeal in *Vynotas* and *Grosser* as to its significance, being contained in a "transitional planning scheme". The flavour of the interaction between that consideration and the others which affected His Honour's approach was factual. Attributing what may be felt to be insufficient weight to a consideration relevant to an evaluative analysis has not, on the *House v The King* (1936) 55 CLR 499, 505 approach, been regarded as disclosing error of law. I would not so regard it. A contrary approach would render discretionary judgments intolerably vulnerable to challenge.

[13] I would order:

(a) that there be leave to appeal;
(b) that the appeal be dismissed; and
(c) that the applicant pay the respondents' costs to be assessed.

[14] **McMURDO P:** I agree with the reasons for judgment of Atkinson J and with the orders she proposes.

[15] As Atkinson J demonstrates, his Honour misconstrued the City of Gold Coast Planning Scheme. His Honour also wrongly concluded that "must" in s 4.4(5A) *Local Government (Planning and Environment) Act* 1990 (Qld) might be read as directory, not imperative. Those errors necessarily affected the judicial exercise of the discretion conferred by s 4.4(5A)(b) of that Act because only when the extent of the conflict with the planning scheme is appreciated can that discretion be properly exercised. His Honour further erred in concluding that the onus upon the respondent under that subsection will not be "terribly high", no doubt because of his earlier errors. These errors of law require the remittal of this matter to his Honour for determination according to the reasons of this Court. Of course, this may not necessarily produce a different result but the discretion must be re-exercised according to law.

[16] I agree with the orders proposed by Atkinson J.

[17] **ATKINSON J:** This is an application for leave to appeal a decision of the Planning and Environment Court of Queensland ("the Court"). Section 4.1.56 of the *Integrated Planning Act* 1997 ("the IPA") sets out both that leave to appeal is necessary and the grounds on which an appeal may be granted. It provides:

> "(1) A party to a proceeding may, under the rules of court, appeal a decision of the court on the ground –
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> (a) of error or mistake in law on the part of the court; or
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> (b) that the court had no jurisdiction to make the decision; or
>
> (c) that the court exceeded its jurisdiction in making the decision.
>
> (2) However, the party may appeal only with the leave of the Court of Appeal or a judge of Appeal."

The parties were content that the hearing of the application be treated as the hearing of the appeal if leave were granted. The ground relied upon is error or mistake of law. The test to be applied for present purposes is whether an alleged error on the part of the Court "could … have materially affected [the] decision".[1]

[18] On 1 February 2002, the Court dismissed an appeal against a decision of the first respondent, the Gold Coast City Council ("the council"), to approve a development application by the second respondent, Gordon Lakelands Pty Ltd, for preliminary approval of a material change of use to land at the corner of Connor Street and Park Avenue, Burleigh Heads ("the site"). The site formerly contained a Roman Catholic church and associated school but is presently vacant. Its historical usage meant that it was classified in the council's Special Facility (Church School) Zone.

[19] The site, the subject of the development application, is within the Burleigh Ridge Development Control Plan ("Burleigh Ridge DCP") area bordered to the north by Park Avenue and to the east by Connor Street. Across the road from the proposed development in Connor Street is an open air parking station and further east towards the ocean is the Burleigh Heads retail and commercial area. To the north of the proposed development across Park Avenue are commercial buildings which are found within the commercial precinct of Burleigh Heads. The site slopes down from west to east with the lowest part being on Connor Street. The area immediately to the north and east of the site is within a different Development Control Plan area, the Burleigh Heads Central Area Development Control Plan.

[20] The proposed development is for a U-shaped building with the open part facing Park Avenue. The proposal is for the development to consist of some 61 residential units and 101 car parking spaces. At the Connor Street or eastern end of the U-shape will be a restaurant. On the western end of the U-shape it is intended to incorporate a church, below street level.

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1 *Holts Hill Quarries P/L v Gold Coast City Council & Ors* [2000] QCA 268 at [9].

[21] It is proposed that the development be three storeys in height on the western side; three to four storeys on the southern side; and four storeys in height on the eastern or Connor Street side. The appellant, Anne Weightman, objected to the proposal to allow a fourth storey on the Connor Street side of the site. The learned judge summarised her objections as follows:

> "[T]he inclusion of a four storey component on Connor Street conflicts with the planning scheme, is entirely out of keeping with the character of development in the area, and is inconsistent with a legitimate expectation of Burleigh Heads' residents in respect of further development of land in this locality."

[22] The grounds of appeal argued before this Court were that there were the following errors of law made by the learned primary judge which would be likely to have materially affected the outcome of the hearing:

1. failing to consider or to properly consider all instances of conflict between the proposed development and relevant provisions of the strategic plan and development control plans of the planning scheme for the Gold Coast City;
2. failing to apply the relevant provisions of the transitional planning scheme in the assessment of the development application in contravention of s 6.1.29 of the IPA;
3. wrongly determining the types of planning grounds which the Council could or should take into account;
4. failing to properly apply the test imposed by s 4.4(5A) of the *Local Government (Planning and Environment) Act* 1990 ("the P & E Act"), as applied by s 6.1.30 of the IPA.

The first three grounds were essentially illustrative of the fourth ground. Each related to the permission to build to four storeys on the eastern side of the site.

**The Planning Scheme**

[23] The development of this part of Burleigh Heads is governed by a planning scheme of the Gold Coast City Council made pursuant to State government legislation. The relevant planning scheme is the City of Gold Coast Planning Scheme of February 1994 ("the Gold Coast Scheme"), which incorporates the Burleigh Ridge DCP. This was a planning scheme under the P & E Act which was in force immediately prior to the commencement on 30 March 1998 of the IPA, which repealed the P & E Act. It is, therefore, a "former planning scheme" within the definition in s 6.1.1 of the IPA.[2]

[24] Section 6.1.2 of the IPA provides that a "former planning scheme" continues to have effect notwithstanding the introduction of the IPA, subject to some qualifications:

> **"6.1.2(1)** Despite the repeal of the repealed Act, each former planning scheme continues to have effect in the local government area for which it was made, subject to subsections (2) and (3).

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[2] See the clear summary of the provisions of Ch 6 of the IPA in *Grosser v Council of the City of the Gold Coast* [2001] QCA 423 at [26]-[29].

> **(2)** If a provision of a former planning scheme is inconsistent with chapter 3, to the extent the provision is inconsistent, chapter 3 prevails, unless this chapter states otherwise.
>
> **(3)** A prohibited use in a former planning scheme is taken to be an expression of policy that the use is inconsistent with the intent of the zone in which the use is prohibited."

[25] Under s 6.1.3 of the IPA, the provisions (including any maps, plans, diagrams or the like) of a "former planning scheme" comprise a "transitional planning scheme", unless otherwise stated in Ch 6 of the IPA. In *Vynotas Pty Ltd v Brisbane City Council*[3], Davies JA held that a transitional planning scheme does not have binding force but is of persuasive relevance only. Pincus JA, on the other hand, held[4] that the flexibility given by Chapter 6 of the IPA does not justify failure to accord considerable weight to the transitional planning scheme. As White J (with whom Thomas and Williams JJA agreed) more recently observed:[5]

> "There can be little doubt that s 6.1.2 of the IP Act maintains the importance of consistency with the intent of a transitional planning scheme."

[26] Chapter 6 of the IPA contains the rules relating to transitional planning schemes. In particular, s 6.1.29 and s 6.1.30 set out the matters that must be considered in assessing and deciding development applications to which a transitional planning scheme applies. These two sections invoke the provisions of the P & E Act in situations where it would previously have been applicable.

[27] Under the P & E Act, a development application that included proposals in conflict with a planning scheme was dealt with under s 4.3(1) as a proposal to amend the planning scheme. Therefore, the application in this case would formerly have been made in accordance with s 4.3(1) of the P & E Act.

[28] Section 6.1.29(h)(i) of the IPA provides that where an application for development would formerly have been made under s 4.3(1) of the P & E Act, the local government must consider all the matters set out in s 4.4(3) of the P & E Act. Further, s 6.1.30(3)(a) of the IPA provides that in such a case, the application must be decided under subss 4.4(5) and (5A) of the P& E Act. Section 4.4(5A) provides that:

> "The local government must refuse to approve the application if-
> (a) the application conflicts with any relevant strategic plan or development control plan; and
>
> (b) there are not sufficient planning grounds to justify approving the application despite the conflict."

[29] It was not disputed that, as the primary judge found, the Gold Coast Scheme is the relevant strategic plan and the Burleigh Ridge DCP, found in Part 28 of the Gold Coast Scheme, is a development control plan (DCP) for the purposes of s 4.4(5A) of the P & E Act. It is necessary, therefore, to first determine, pursuant to

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3 [2001] 1 Qd R 108 at 113.
4 (supra) at 114.
5 *Grosser v Council of the City of the Gold Coast* (supra) at [36].

s 4.4(5A)(a), in which ways, if any, the application conflicts with the Gold Coast Scheme or the Burleigh Ridge DCP.

**Conflict with planning scheme**

[30] With regard to building height, the following provisions are relevant. Part 1-11 of the Gold Coast Scheme identifies as an objective of areas designated as multi-unit development:

> "(b) **To achieve diversity in townscape and urban character**
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> Development in multi-unit areas will be subject to provisions which establish *permitted* and *permissible* residential densities and building heights, both of which vary for particular parts of the City so as to achieve variety in townscape and urban character. The Council will seek to achieve gradation in building heights to complement groupings of high and low rise development. This gradation will be achieved both as the result of the maximum *permitted* and *permissible* heights stipulated and also through the exercise of the Council's discretion in assessing *permissible* development. *Accordingly, it is envisaged that development will not achieve the maximum permissible building height in most instances*." (emphasis added)

[31] This objective draws a critical distinction between maximum *permitted* and *permissible* building heights. When the Council is assessing a permissible development, it will exercise its discretion with regard to the permissible building height to achieve gradation in building heights. To achieve gradation the Council will, in most instances, not approve a building to the maximum permissible building height. There is no suggestion in this part of the Gold Coast Scheme that the Council has or would exercise a discretion to allow a building height above the maximum permitted building height. This is a critical distinction between the terms "permitted" and "permissible" used in this part. The latter implies the ability to exercise a discretion; the former does not.

[32] The permitted and permissible heights of any particular development are governed by s 4.16.4 of the Gold Coast Scheme which provides that:

> "**4.16.4 Height of Development**
>
> Purpose:
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> To provide for diversity in the built form of the City and for the orderly development of the City's townscape through the grouping of high rise structures and the imposition of transitional building heights which complement such groupings.
>
> Provisions:
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> 4.16.4.1 The permitted height of any multi-unit building, townhouse development, motel or hostel accommodation shall not exceed the number of storeys as shown on the Residential Density and Building Height Maps, provided that –

(i) where the term H3 is followed by an asterisk on the Residential Density and Building Height Maps, the Council may grant a special approval to permit the development of a partial fourth storey where all of the following criteria are met:

(a) the partial fourth storey comprises part of dwelling units located on the third storey;

(b) the partial fourth storey does not exceed fifteen percent (15%) of the gross floor area of the building and fifty percent (50%) of the area of the floor below;

(c) the proposal demonstrates a significant reduction in site coverage;

(d) the proposal complies with the provisions of the Strategic Plan and any Develoment [*sic*] Control Plan;

(e) the proposal is in keeping with the nature and character of surrounding development; and

(ii) where a height appears in brackets on the Residential Density and Building Height Maps, that height shall denote the maximum height to which development may be increased, subject to the town planning consent of the Council; and

(iii) where the letter "X" appears in brackets on the Residential Density and Building Height Maps, development may be increased above the permitted height, to a height established subject to the town planning consent of the Council.

4.16.4.2 In assessing an application for town planning consent pursuant to provision 4.16.4.1, the Council shall have regard, amongst any other matters, to the following –

(i) the height of existing buildings in the immediate proximity; and

(ii) the provisions of the Planning Scheme for building heights in the immediate proximity; and

(iii) the provisions of the Strategic Plan; and

(iv) the design of the building including the proposed site coverage; and

(v) the impact of shadows cast by the building; and

(vi) whether adequate services can be provided; and

(vii) whether the proposal will interfere with the efficient functioning of the Coolangatta Airport or other aeronautical facilities; and

(viii) the purpose of Clause 4.16.4."

[33] Section 4.16.4.1(i), (ii) and (iii) set out the provisos to the general rule that the height of a development will not exceed the number of storeys as shown on the Residential Density and Building Height Maps. Height restrictions may only be relaxed under the planning scheme in the circumstances set out in s 4.16.4.1(i) or increased in the circumstances set out in s 4.16.4.1(ii) and (iii), none of which, it was common ground, applied in the circumstances of this case. There was no asterisk after the term H3 which would make the partial relaxation found in s 4.16.4.1(i) permissible; there was no higher figure in brackets which would connote a greater maximum building height which could be permitted with the approval of Council; and there was no letter "X" in brackets which would allow the Council to exercise a discretion to permit a building height above the otherwise permitted maximum. Subsections 4.16.4.1(i), (ii) and (iii) deal with circumstances where there is a discretion which may be exercised. Section 4.16.4.2 sets out the factors relevant to the exercise of that discretion. There is no other circumstance which enables the Council to exercise such a discretion. The learned primary judge wrongly viewed factors enumerated in s 4.16.4.2 as not only relevant but as including matters the Council would be obliged to take into account in the exercise of a discretion as to what building height should be permitted above the maximum permitted building height. However, in this situation none of the provisos found in s 4.16.4.1(i), (ii) or (iii) applied and there was, consequently, no discretion to be exercised.

[34] The development design provisions in clauses 28.2.3(b)(i) and (ii) of the Burleigh Ridge DCP provide:

"i) Guidelines for appropriate building designs are shown on Figures 1-4 inclusive. Particular attention in the design of multi-storey buildings should be given to a terraced building profile receding from the property frontage or along the line of slope and the use of extensive landscape planting beds on all building levels in order to soften the building line.

ii) The height of all development shall be in accordance with the provision of the Planning Scheme and the Residential Density and Building Height Maps. Council will have regard to this D.C.P. and the Strategic Plan when assessing applications to increase the height of development pursuant to those provisions. *The height of all development shall not exceed the maximum heights stipulated in the Planning Scheme in any circumstances*. (emphasis added)

It was common ground that the maximum height permitted on this land was three storeys. There was no greater permissible or permitted height. The proposed

development was, therefore, in conflict with the Gold Coast Scheme and the Burleigh Ridge DCP.

**Sufficient planning grounds**

[35] The proposal must be refused in such a situation if there are not sufficient planning grounds to justify the approval *despite the conflict*. The discretion, as White J observed in *Grosser v Council of the City of the Gold Coast*[6], is couched in negative terms, that is, the application must be dismissed unless there are sufficient grounds. This is a mandatory requirement. If there is a conflict, then the application must be rejected unless there are sufficient planning grounds to justify its approval despite the conflict. The primary judge wrongly held that it was directory only.

[36] In order to determine whether or not there are sufficient planning grounds to justify approving the application despite the conflict, as required by s 4.4(5A)(b) of the P & E Act, the decision maker should:

1. examine the nature and extent of the conflict;
2. determine whether there are any planning grounds which are relevant to the part of the application which is in conflict with the planning scheme and if the conflict can be justified on those planning grounds;
3. determine whether the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application notwithstanding the conflict.

[37] The first task required of the decision maker, as the learned primary judge recognised, is to consider the nature and extent of the conflict. The conflict may be minor or major in nature or indeed anywhere on the continuum between those two extremes. The conflict in this case is a major one, arising as it does from an absolute prohibition on the height of any development exceeding the maximum stipulated height of three storeys.

[38] Part 1 of the Gold Coast Scheme sets out the strategic plan for the whole of the City of the Gold Coast and includes sections entitled "Shaping the Future City", "The Structure Plan", "Strategic Planning Statements" and "City Character". It is the overall planning scheme for the city and so provides an overview of planning for the whole area. It sets out the considered planning grounds for development in the area. It is here that one finds the provision that it is a planning objective that in most instances development will not reach even the maximum permissible building height.

[39] Part 4 of the Gold Coast Scheme provides a comprehensive planning guide to the residential zones in the Gold Coast. It sets out the appropriate planning grounds for development in these zones. It is in s 4.16 (which contains provisions in respect of multi-unit buildings, townhouse development, motel and hostel accommodation in the residential multi-unit zone, resort residential 1 zone and resort residential 2 zone) that the provision prohibiting building height in excess of that specified is found. Here too are found the provisos which allow relaxation of the height restriction. Such relaxation is not permitted on the facts of this case. The learned primary judge did not specifically refer to the inability to relax under the Gold Coast Scheme nor to any of the provisos.

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6 (supra) at [50].

[40] The DCP for the Burleigh Ridge area sets out the considered planning grounds for development in this particular area of the Gold Coast. It absolutely forbids any development on the site of the proposed development exceeding three storeys *in any circumstances*.

[41] The significance of the nature of this conflict is that it demonstrates that the considered planning grounds of the Council show an express intention to forbid a building height of four storeys. It is not a minor conflict; it is a prohibition and is against each of the planning grounds that the Council itself has determined apply to the height of such a development.

[42] The learned primary judge considered the nature of the conflict but characterised it as only minor or a "technical non-compliance". He drew that conclusion by having regard to the Gold Coast Scheme and by observing that Chapter 6 of the IPA gave a degree of flexibility to decision makers. With regard to the Gold Coast Scheme, his Honour referred to Part 1-11 with its use of the words "diversity" and "variety" and the Council's desire to achieve "gradation in building heights to complement groupings of high and low rise development." However, this does not support a conclusion that the Council will achieve this objective by allowing building above the permitted building heights. As I have already observed, paragraph (b) itself says that this objective will be achieved, when the Council is exercising its discretion with regard to permissible building heights, by requiring buildings in most instances to be below the maximum permissible height.

[43] His Honour held that Part 1-11 reduced the force of s 4.16.4 which "purported to" impose strict height limitations. However, the provisions regarding height limitations found in s 4.16.4 are, in my view, consistent with Part 1-11. Part 1-11 sets out the Council's planning objective with regard to building height. Section 4.16.4 then sets out how that objective is achieved. It provides for maximum permitted building heights in the instances set out in the body of s 4.16.4. It then sets out in the provisos found in s 4.16.4.1(i), (ii) and (iii), the only circumstances in which a greater building height will be permitted. Section 4.16.4.2 sets out the factors which the Council must consider when exercising its discretion. The factors enumerated in s 4.16.4.2 are relevant only to the exercise of the discretion given by s 4.16.4.1(i), (ii) and (iii). It has no relevance to a development which has a maximum permitted building height which is incapable of relaxation. His Honour misconstrued the effect of Part 1-11 and s 4.16.4 of the Gold Coast Scheme. Misconstruction of a planning scheme is an error of law[7] which undoubtedly affected his decision. It led his Honour wrongly to characterise the onus which the second respondent had to satisfy by saying "the hurdle will not be terribly high".

[44] The second question the decision maker has to consider is whether there are any planning grounds on which to approve, or which militate against approval of, that part of the application which is in conflict with the planning scheme. The nature and extent of the conflict may be such as to suggest that there are significant planning considerations against that part of the application.

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[7] *HA Bachrach Pty Ltd v Caboolture Shire Council* [1993] QPLR 33 at 38-39; *Yu Feng Pty Ltd v Maroochy Shire Council* [2000] 1 Qd R 306 at 343 per Pincus JA.

[45] The decision maker should then consider other aspects of the development and determine whether they are consistent with proper planning grounds. Those are the planning grounds which apply whether or not the conflict exists.

[46] It is only after consideration of all of these matters that the decision maker is able properly to assess whether or not the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application notwithstanding the conflict.

[47] As the learned primary judge erred in his application of the test imposed by s 4.4(5A)(b) of the P & E Act, as instanced in these reasons, and as this error is likely to have affected his decision, the application for leave to appeal should be granted, the appeal should be allowed and the matter remitted to his Honour for determination.

**Orders**

1. Application for leave to appeal granted.
2. Appeal allowed.
3. Remitted to the learned primary judge to be determined in accordance with law.